DEPARTMENT OF STATE REVENUE

04-20160500.LOF

Letter of Findings Number: 04-20160500
Sales/Use Tax
For The Tax Years June 1, 2012 through and including December 31, 2014

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana Car Dealership was liable for the sales tax on one vehicle which it sold to out-of-state purchaser, because it failed to properly document the exempt sale. Dealership was also liable for the sales tax on the optional products sold to customers because they were taxable transactions. Dealership was not liable for the use tax on one purchase for which sales tax was paid, but was responsible for the remainder. Negligence penalty could not be abated.

ISSUES

I. Sales Tax - Imposition.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-2-3; IC § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-2.5-5-24; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64 (Ind. 2009); Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974); Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454 (Ind. Ct. App. 1988); Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002); Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991); Indiana Dep't of State Revenue v. Martin Marietta Corp., 398 N.E.2d 1309 (Ind. Ct. App. 1979); Galligan v. Indiana Dep't. of State Revenue, 825 N.E.2d 467 (Ind. Tax Ct. 2005); 45 IAC 2.2-2-1; 45 IAC 2.2-4-1; 45 IAC 2.2-5-53; 45 IAC 2.2-5-54; Sales Tax Information Bulletin 28S (April 2012).

Taxpayer protests the assessment of sales tax.

II. Use Tax - Imposition.

Authority: IC § 6-2.5-1-21; IC § 6-2.5-1-5; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-3-5; IC § 6-2.5-4-10; IC § 6-2.5-13-1; Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); Mason Metals Co. v. Indiana Dep't of State Revenue, 590 N.E.2d 672 (Ind. Tax Ct. 1992); 45 IAC 2.2-3-14; 45 IAC 2.2-4-1; 45 IAC 2.2-4-27.

Taxpayer protests the assessment of use tax on several purchases.

III. Tax Administration - Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer requests that the Department abate the negligence penalty.

STATEMENT OF FACTS

Taxpayer is a licensed Indiana car dealership in the business of selling new and used vehicles. Taxpayer's customers include individuals and companies from states other than Indiana. Taxpayer occasionally delivers vehicles to its customers' residences or business locations.

In 2015, the Indiana Department of Revenue ("Department") audited Taxpayer's business records and tax returns for the tax years beginning June 1, 2012, through and including December 31, 2014. Taxpayer and the Department both agreed to utilize two statistical sampling methods to project the audit results for Indiana sales and use tax purposes.

Pursuant to the audit, the Department determined that Taxpayer sold several vehicles to its customers but failed to collect sales tax or exemption certificates on the transactions which were subject to Indiana sales tax. Additionally, the audit determined that Taxpayer made several errors in calculating sales tax on vehicles sold to Indiana and Kentucky purchasers. The audit also found that Taxpayer sold some taxable optional products, including "Express Code," "Express Etch," or "Security Product" to its customers without collecting sales tax. In addition, the audit determined that Taxpayer purchased various items of tangible personal property to be used for its business without paying sales tax or self-assessing and remitting the use tax. Pursuant to the audit, the Department assessed Taxpayer additional sales tax, use tax, penalty, and interest accordingly.

Taxpayer protested the assessment based on various reasons. An administrative hearing was held. This Letter of Findings results and addresses the remaining items. Further facts will be provided as necessary.

I. Sales Tax - Imposition.

DISCUSSION

During the audit, pursuant to the agreed projection methods, the Department used a block sample to determine the tax on Taxpayer's sales of vehicles. The audit also determined that Taxpayer had some taxable sales of optional products, which were associated with the sales of the vehicles before acceptance of the sales. Taxpayer, however, did not properly collect the sales tax on those taxable sales. The audit further determined that Taxpayer purchased certain items of tangible personal property to be used for its business, but it did not pay sales tax or remit the use tax on those items.

Taxpayer disagreed with a portion of the audit's determination, claiming that the Department's assessment was overstated. Taxpayer asserted that it was not responsible for the sales tax imposed on one vehicle because the sale was an exempt sale. Taxpayer also argued that it sold an "insurance policy," including "Express Code," "Express Etch," or "Security Product" to protect the purchasers from vehicle theft. Taxpayer maintained that the sales of insurance policies were not subject to sales tax. In addition, Taxpayer claimed that it was not liable for the use tax on certain purchases because it paid sales tax at the time of purchases.

Indiana mandates that every person who is subject to a listed Indiana tax must keep books and records, including all source documents, "so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). "If the [D]epartment reasonably believes that a person has not reported the proper amount of tax due, the [D]epartment shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the [D]epartment." IC § 6-8.1-5-1(a). All tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012). "Each assessment and each tax year stands alone." Miller Brewing Co. v. Indiana Dep't of State Revenue, 903 N.E.2d 64, 69 (Ind. 2009). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). Also, "all statutes are presumptively constitutional." Indiana Dep't of State Rev. v. Caterpillar, Inc., 15 N.E.3d 579, 587 (Ind. 2014) (citing UACC Midwest, Inc. v. Indiana Dep't of State Rev. 629 N.E.2d 1295, 1299 (Ind. Tax Ct. 1994)). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." Caterpillar, Inc., 15 N.E.3d at 583.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a); 45 IAC 2.2-2-1. A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible person property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). The purchaser in general "shall pay the tax to the retail

merchant as a separate added amount to the consideration in the transaction." Id. "The retail merchant shall collect the tax as agent for the state." Id.

When a purchaser claims the purchase "is exempt from the state gross retail [] tax[], the purchaser may issue an exemption certificate to the seller instead of paying the tax." IC § 6-2.5-8-8(a). The "seller accepting a proper exemption certificate under [IC § 6-2.5-8-8] has no duty to collect or remit the state gross retail [] tax on that purchase." Id. Otherwise, as an agent for the State of Indiana, the seller "holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3.

Additionally, a statute which provides a tax exemption is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." Id. at 101 (internal citations omitted). In applying any tax exemption, "[t]he general rule is that tax exemptions are strictly construed in favor of taxation and against the exemption." Indiana Dep't of State Revenue v. Kimball Int'l Inc., 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer in this protest claimed that the audit assessment is overstated based on various reasons. This Letter of Findings addresses them in turn as follows:

A. Undocumented Exempt Sale

Taxpayer protested the audit's assessment on a $21,584 vehicle (NR 0067; Nissan NV200) sold to a Kentucky company on June 6, 2013. The audit noted that Taxpayer did not collect the sales tax nor did it obtain the required "Exemption Certificate."

In its July 13, 2016, protest letter, Taxpayer stated, in relevant part, as follows:

> The taxpayer does not understand the inclusion of the vehicle noted on schedule 1. As noted on page 8 of the auditor's report, "Ultimately, all of these types of transactions have been removed from all sample months' listings of errors[."] However, this vehicle transaction remained on the final audit report . . .
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> In addition, the taxpayer disagrees with the auditor regarding documentation of out of state deliveries . . . [and] contends that it is in compliance with the requirements as the Information Bulletin [28S] is not specific on the types of documentation to be kept . . . .

Sales of vehicles in Indiana generally are subject to Indiana sales tax unless the transactions are specifically exempted under Indiana law. In addition to the exemption under IC § 6-2.5-5-8, one particular exemption relevant to this case is a retail transaction that qualifies for the interstate commerce exemption. IC § 6-2.5-5-24(b); See also 45 IAC 2.2-5-53; 45 IAC 2.2-5-54. Specifically, 45 IAC 2.2-5-54(b), in relevant part, provides that:

> Sales of tangible personal property which are delivered to the purchaser in a state other than Indiana for use in a state other than Indiana are not subject to gross retail tax or use tax, provided the property is not intended to be subsequently used in Indiana.

The Department's Sales Tax Information Bulletin 28S (April 2012), 20120530 Ind. Reg. 045120259NRA ("Information Bulletin 28S"), addresses issues concerning sales of motor vehicles which applies to the tax years at issue. The Information Bulletin 28S further explains, in relevant part, as follows:

> **IV. INTERSTATE COMMERCE EXEMPTION**
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> A vehicle . . . sold in interstate commerce is not subject to the Indiana sales tax. **To qualify as being "sold in interstate commerce," the vehicle . . . must be physically delivered**, **by the selling dealer to a delivery point outside Indiana**. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. **Terms and the method of delivery must be indicated on the sales invoice**. **The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale**. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. (**Emphasis in original**) (**Emphasis**

added).

Thus, a licensed Indiana car dealer generally must either collect sales tax or an exemption certificate at the time of the car sale. Further, to qualify for the interstate commerce exemption, the dealer must document the terms and the method of delivery on the sales invoice and maintain copies of delivery documents to substantiate that the vehicles are sold in interstate commerce, otherwise, the dealer will be responsible for the Indiana sales tax.

Taxpayer here simply referenced the audit report without providing the source documents concerning the transaction in question (NR 0067; Nissan NV200), in which a Kentucky company was the purchaser. The audit noted, in relevant part, that:

> In reviewing taxpayer's records for the sample months, auditors encounter a sale where no sales tax was collected by the dealer. In particular, there was no properly executed form ST-108E. Taxpayer was provided a "Special Exemption Certificate" Form AD-70 for this deal. Auditors allowed the taxpayer fourteen (14) days initially to obtain a signed AD-70 as documented by the signed Form AD-14 Notice of Noncompliance included [in] this report.

Thus, if the purchaser claimed that its purchase was exempt at the time of the sale, a properly signed "Special Exemption Certificate" AD-70 Form is needed, as requested during the audit. Otherwise, Taxpayer must provide verifiable documents to verify its out-of-state delivery. In other words, in the absence of other verifiable documentation, that vehicle is presumed to be sold and accepted at the dealership's Indiana location. When the Kentucky purchaser accepted that vehicle at the dealership's business location in Indiana, the sale was an Indiana retail transaction and subject to Indiana sales tax pursuant to the above-mentioned statutes, regulations, and case law. Taxpayer must collect the Indiana sales tax or, in an alternative, the valid exemption certificate, AD-70 form.

In the absence of other verifiable supporting documentation to demonstrate otherwise, the audit properly assessed Taxpayer additional tax because Taxpayer is responsible for the sales tax under IC § 6-2.5-9-3. Taxpayer's protest of the assessment of tax on this transaction is denied.

B. Sales of Optional Products Other Than Vehicles Prior to Acceptance

In addition to selling vehicles, Taxpayer sold several optional products, including "Express Code," "Express Etch," or "Security Product" to its customers. Taxpayer incorporated those optional products into the vehicles customers purchased prior to the conclusion of the sales. The audit noted that Taxpayer sold "a number of products that were incorporated into the vehicle prior to acceptance" without collecting sales tax. The audit further noted that each of the products were comprised of both tangible personal property and services stated together as one price on the buyers' orders that are added to the vehicles prior to transfer to Taxpayer's customers. After reviewing Taxpayer's records and the publicly available information concerning the optional products at issue, the audit concluded that sales of the optional products were taxable retail transactions under 45 IAC 2.2-4-1.

45 IAC 2.2-4-1 in part explains:

> (a) **Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".**
> (b) **All elements of consideration are included in gross retail income subject to tax.** Elements of consideration include, but are not limited to:
> (1) The price arrived at between purchaser and seller.
> (2) **Any additional bona fide charges added to or included in such price** for preparation, fabrication, alteration, modification, finishing, completion, delivery, or **other services performed in respect to** or labor charges for work done with respect to **such property prior to transfer**.
> (3) **No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail**.

(**Emphasis added**).

The Indiana Tax Court has addressed the issue of "mixed transactions" that involve the simultaneous transfer of tangible personal property and the performance of services. In Frame Station, Inc. v. Indiana Dep't of Revenue, 771 N.E.2d 129 (Ind. Tax Ct. 2002), the taxpayer, Framemakers, provided custom framing services. Specifically, Framemakers framed its customers' art in frames that it built or special ordered. Id. at 130. Framemakers, when it

billed its customers, "record[ed] separate subtotals on the invoices: one for the service of framing the art and the other for the frame itself." Id. Framemakers collected sales tax only on the price of the frame itself, not on the price for framing the art. Id. The court stated that the issue was "whether Framemakers' sale of custom-framed art constitutes a 'retail unitary transaction' and is thereby subject to Indiana's gross retail and use tax." Id. at 129-30. Specifically, the court focused on "whether Framemakers' services were performed before or after it transferred property to its customers." Id. at 131. (Emphasis in original). The court explained that services that "are performed with respect to property prior to the transfer of the property" are taxable. Id. Referencing Cowden & Sons Trucking, Inc. v. Indiana Dep't of State Revenue, 575 N.E.2d 718 (Ind. Tax Ct. 1991) and Indiana Dep't of State Revenue v. Martin Marietta Corp., 398 N.E.2d 1309 (Ind. Ct. App. 1979), the court stated "a retail unitary transaction exists when the transfer of the property and rendition of services are 'inextricable and indivisible'" from the property being transferred. Id. at 131. The court concluded that Framemakers' services were performed prior to the transfer of the property and constituted taxable retail unitary transactions pursuant to IC § 6-2.5-4-1(e). Id. Therefore, the court determined that Framemakers' service charges were subject to sales tax. Id. See also Galligan v. Indiana Dep't. of State Revenue, 825 N.E.2d 467, 480-81 (Ind. Tax Ct. 2005) (explaining that "the legislature has set forth several parameters for imposing tax on these transactions. First, taxable property does not escape taxation merely because it is transferred in conjunction with the provision of non-taxable services. Second, services, generally outside the scope of taxation, are subject to tax to the extent the income represents 'any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records.' Finally, the legislature imposes tax on services that are provided in a retail unitary transaction, 'a unitary transaction that is also a retail transaction.' A unitary transaction is one which 'includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.'")

Taxpayer argued that it "sells to their customers, an insurance policy offered by [Vendor] called Express Code/Etch/Security." Taxpayer stated that "[t]his is an agreement in which [Vendor] will cover the end customer in the case of a vehicle theft." Taxpayer thus argued that it "simply sells this contract to their customer, similar to an insurance agent selling an insurance policy to their customer, and receives a commission upon the sale." Taxpayer submitted the "Limited Guarantee Theft Agreements" to support its protest.

Upon review, however, Taxpayer's argument and its reliance on the agreements is misplaced. First, Taxpayer did not reference any statutory authority to support its argument that the sales of optional products were exempt from sales tax. Vendor's agreement specifically stated that "This Limited Guarantee is a Product Warranty and is not Insurance. It is not subject to state insurance laws but is subject to state law concerning warranties . . . ." In other words, insurance transactions are regulated by states. To sell insurance policies in the state, Taxpayer is required to obtain the licenses and permission from the state. Taxpayer had none and thus its argument must fail.

Second, as the audit noted and Taxpayer's representatives explained during the hearing, Taxpayer's employees installed or incorporated the necessary required tangible component, such as tracking information or system, into the vehicles following its customers purchase orders. Taxpayer charged its customers in the same sale invoices (buyers' orders) before customers accepted, signed, and completed the vehicle sales. Regardless of the arrangements Taxpayer had with its Vendor, Taxpayer here was the retail merchant who sold the optional products to its customers and installed or incorporated the products into the vehicles prior to each customers' acceptance. They were unitary transactions because "the transfer of the property and rendition of services [were] 'inextricable and indivisible'" from the property being transferred. Frame Station, 771 N.E.2d at 131. See also IC § 6-2.5-1-5(a)(3) (stating "'gross retail income' means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold . . . valued in money, whether received in money or otherwise, without any deduction for . . . **charges by the seller for any services necessary to complete the sale**, other than delivery and installation charges . . . ." (**Emphasis added**).)

C. Math Errors and Posting Errors

During the audit, the Department "discovered six (6) vehicle sales where [T]axpayer remitted to the Department less than the total amount of sales tax due." The audit determined that all six sales were Indiana sales subject to Indiana sales tax. Among these sales, several purchasers were Kentucky residents. Since these sales occurred prior to July 1, 2014, Indiana imposed a sales tax at seven percent rate without deferential treatment on Indiana sales of motor vehicles. See 2014 Ind. Acts 1983, P.L. 166-2014, § 9 (codified at IC § 6-2.5-2-3) (offering deferential treatment on certain qualified Indiana sales of motor vehicles beginning July 1, 2014). The audit explained in relevant part, as follows:

While Indiana has the higher tax rate of seven percent (7[percent]) compared to Kentucky's rate of six

> percent (6[percent]), the amount of sales or use tax a Kentucky resident will ultimately owe the state of Kentucky might be greater than the amount of sales tax collected on an Indiana transaction. Indiana allows for a trade allowance on like kind exchanges where as Kentucky does not allow a trade allowance before calculating the amount of tax due on the purchase of a motor vehicle . . . . [T]axpayer . . . included in the amount to be financed all taxes and fees.
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> In order to accomplish this task, [T]axpayer's system has been set up with three accounts where these funds are to be recorded and from which to distribute the funds for payment to Indiana or a check written to give to the customer's county clerk when the vehicle is registered. One of the accounts, account [No. 2], is meant to have the amount of Indiana tax collected from customers that do not reside in Indiana. The primary account, account [No. 1], is meant to have the amount of Indiana tax collected on Indiana residents. For an Indiana resident, there is no need to collect any additional sales tax. The third account, account [No. 3], is meant to post the amount of tax that has been collected to be paid to the customers' local license branch.
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> During the posting process and payment process, [T]axpayer has made both posting and math errors leading to these adjustments. Auditor discussed these adjustments with the [T]axpayer at the final conference, and [T]axpayer indicated that they understood and agreed with auditors' adjustments . . . .

Nonetheless, Taxpayer protested the audit's adjustment of three (3) vehicle sales, claiming that it collected and remitted the proper amount of the sales tax. Taxpayer provided the documents contained within its dealer's jacket for the three vehicles in question and the customers' account history.

Upon review, however, Taxpayer's reliance on its documents is misplaced. Specifically, the audit determined that the sales of the three vehicles were Indiana sales. Thus, Taxpayer should have collected the seven percent sales tax after deducting the allowance pursuant to Indiana law. Taxpayer's documents failed to substantiate its calculation. Additionally, since the sales were Indiana sales, Taxpayer should have remitted the tax to Indiana from its account No. 3, not No. 2, because "tax and fees" were recorded under account No. 3 for non-Indiana purchasers. Thus, the audit properly made the adjustments.

FINDING

Taxpayer's protest of Issue I is respectfully denied. Taxpayer's protest of the imposition of sales tax on one vehicle (NR 0067; Nissan NV200) and optional products is respectfully denied. Also, Taxpayer's documents failed to demonstrate that the audit's adjustments of Taxpayer's math errors were incorrect.

II. Use Tax - Imposition.

The audit assessed Taxpayer additional use tax on various purchases, including computer software, tools, equipment, and signs, because the audit concluded that Taxpayer did not pay sales tax or use tax on the purchases. Taxpayer claimed that it was not responsible for the use tax because it paid sales tax at the time of purchases.

In addition to a sales tax, Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Rental and leasing of tangible personal property is also a taxable retail transaction subject to sales tax or use tax. IC § 6-2.5-1-21; IC § 6-2.5-4-10(a); IC § 6-2.5-13-1; 45 IAC 2.2-4-27; See also Mason Metals Co. v. Indiana Dep't of State Revenue, 590 N.E.2d 672 (Ind. Tax Ct. 1992). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoade v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002). An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and 45 IAC 2.2-3-14. Similarly, when a purchaser or lessee pays a portion of sales tax at the time of lease to another state, Indiana allows a credit for the tax paid. IC § 6-2.5-3-5 (stating "A person is entitled to a credit against the use tax imposed on the use, storage, or consumption of a particular item of tangible personal property equal to the amount, if any, of sales tax, purchase tax, or use tax paid to another state . . . for the acquisition of that property").

In this instance, in addition to a Master Equipment Lease Agreement, Taxpayer submitted several purchase invoices to support its claim that it was not responsible for the use tax because sales tax was paid. Upon review, the Department is prepared to agree that Taxpayer's documents substantiate its claim that it paid sales tax on its purchase of "Nissan Banners []" dated July 17, 2012, in the amount of $1,600. Thus, the Department will remove

this item from the assessment.

As to the audit's assessment on the "Equipment Lease," however, as discussed in Issue I, Part B, Taxpayer-Lessee was liable for the tax on "the total amount of consideration . . . charges by the seller for any services necessary to complete the sale . . . ." IC § 6-2.5-1-5(a)(3); see also 45 IAC 2.2-4-1(b)(2). Taxpayer's supporting documents for the Equipment Lease demonstrated that it paid sales tax on the delivery charge only, but not other charges. Thus, Taxpayer is entitled to a credit for the sales tax it paid on the delivery charge but it is liable for the use tax on the total amount of consideration, including any services necessary to complete the lease or use of the Equipment.

Finally, Taxpayer remained liable for the use tax assessed on other purchases, including "Pier/Columns, Trench Boxes, Mud Seal for Sign," because its supporting documents could not be verified.

FINDING

Taxpayer's protest of the imposition of use tax is sustained in part and denied in part. Taxpayer's protest of the assessment on "Nissan Banners" is sustained; the remaining items, however, are denied. Taxpayer is entitled to a credit for the sales tax it paid on the delivery charge regarding "Equipment Lease."

III. Tax Administration - Negligence Penalty.

DISCUSSION

The Department's audit imposed a ten percent negligence penalty for the tax period in question. Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a ten (10) percent negligence penalty if the taxpayer:

> (1) fails to file a return for any of the listed taxes;
> (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
> (3) incurs, upon examination by the department, a deficiency that is due to negligence;
> (4) fails to timely remit any tax held in trust for the state; or
> (5) is required to make a payment by electronic funds transfer (as defined in IC 4-8.1-2-7), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

45 IAC 15-11-2(b) further states:

> "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

> The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:
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> (1) the nature of the tax involved;
> (2) judicial precedents set by Indiana courts;
> (3) judicial precedents established in jurisdictions outside Indiana;
> (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice,

etc.;
(5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Department's audit imposed the negligence penalty for various reasons. First, the audit determined that Taxpayer did not maintain adequate records. The audit also noted that Taxpayer failed to comply with the Indiana tax law when the legal resources were easily available. The Department's audit found that Taxpayer's business location is close to the Department's district office. Also, other resources, including the tax "reference library materials" and "the dealer specific link to additional information" on the Department's website, are readily accessible to Taxpayer. The audit further noted that Taxpayer improperly offset some sales tax due to Indiana by the checks written to various county tax authorities under a separate account.

Taxpayer asked the Department to abate the penalty but it did not affirmatively establish reasonable cause. Considering the totality of the circumstances, the Department thus is not able to agree that in this instance the negligence penalty should be abated.

Nonetheless, the use tax imposed on one item under Issue II is sustained, so the penalty on that item will be removed from the assessment.

FINDING

Taxpayer's protest of the imposition of negligence penalty is respectfully denied, except the penalty assessed on the item under Issue II.

SUMMARY

Taxpayer's protest is sustained in part and respectfully denied in part.

On Issue I, Taxpayer's protest is respectfully denied. On Issue II, Taxpayer's protest of the imposition of use tax and also the related negligence penalty on "Nissan Banners" is sustained. Its protest of the remainder of the use tax assessment, however, is respectfully denied. Also, Taxpayer is entitled to a credit for tax paid on the delivery charge regarding "Equipment Lease." On Issue III, Taxpayer's protest of the negligence penalty in general is respectfully denied.

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